Tan Sri Dato' Wan Sidek bin Wan Abdul Rahman v Rahman Hydraulic Tin Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1281 OF 2009
RAMLY ALI, ANANTHAM KASINATHERAND LIM YEE LAN JJCA
8 MAY 2012

Companies and Corporations — Directors — Loss of office — Whether appellant ceased to be director of respondent and thus not qualified to be appointed as MD — Whether appellant had flouted provisions of the Companies Act 1965 and articles of association — Meetings — Annual general meetings — Failure to hold meeting on last day of extended period — Whether appellant ceased to be director on last day of extended period to hold meeting

Contract — Agreement — Service agreement — Whether agreement valid contract of employment — Capacity — Whether appellant had capacity to be appointed managing director of respondent — Whether appellant had valid legal capacity to enter into service agreement

Labour Law — Employment — Dismissal — Constructive dismissal — Respondent's failure to pay appellant's claims and salaries — Whether respondent by its conduct breached fundamental term of service agreement between parties — Whether constructive dismissal proven — Whether Industrial Court had erred in its finding that appellant was not 'workman' under s 2 of the Industrial Relations Act 1967 ('Act') — Whether appellant had by law ceased to be director when respondent failed to hold annual general meeting for continuous period of four years — Whether appellant had capacity to be appointed as managing director of respondent — Whether appellant had legal capacity to enter into service agreement — Whether s 30(5) of the Act could assist appellant — Industrial Relations Act 1967 s 20(3)

On 3 June 1998, the appellant was appointed as a director of the respondent company to fill a casual vacancy after one of its directors resigned. The appointment was pursuant to article 109 of the respondent's articles of association ('AOA'), which provided that the holding of the office of director was to last until the next following annual general meeting ('AGM') of the respondent company. Pursuant to article 60(1) of the AOA the respondent was required to hold an AGM within a year or within 15 months after the last AGM on 26 June 1997 ('the 1997 AGM'). However, the respondent failed to comply with article 60(1) of the AOA. Instead it applied for and was granted two extensions of time until 31 December 1998 to hold the AGM. Despite the

extension of time, no AGM was held on 31 December 1998. On 16 June 2000, special administrators ('the SA') were appointed by Pengurusan Danaharta Nasional Bhd to manage the affairs of the respondent. It was only in 2001 after the appointment of the SA that the respondent convened its next AGM after the 1997 AGM. On 31 March 2000, the appellant entered into a service agreement with the respondent, which was signed by one Chong Kee Ling, a director of the respondent at that time. Under the service agreement, the appellant was appointed as executive chairman/managing director ('MD') for a period of three years from 1 February 2000. The appellant claimed that the respondent had breached the fundamental terms and conditions of the service agreement by not paying his claims and salary from October 2000 to 18 January 2002. The appellant thus claimed that he had been constructively dismissed without just cause or excuse. The appellant's representations were referred by the Minister to the Industrial Court under s 20(3) of the Industrial Relations Act 1967 ('the Act'). The respondent disputed the appellant's claim and contended that the appellant was not a 'workman' as the alleged service contract was null and void and thus unenforceable. The Industrial Court dismissed the appellant's application on the grounds that the appellant was not a 'workman' under s 2 of the Act. The appellant then applied to the High Court for an order of certiorari under O 53 of the Rules of the High Court 1980 to quash the order of the Industrial Court but the High Court dismissed the appellant's application for judicial review. This was the appellant's appeal against the decision of the High Court judge. The appellant submitted that the service agreement was a valid contract of employment between him and the respondent and that the respondent had committed a fundamental breach of that contract. It was the respondent's argument that the appellant who was appointed to fill a casual vacancy on 3 June 1998 pursuant to article 109 of the AOA ceased to be a director of the respondent at the next AGM, which was 31 December 1998 or the last day of the extended period to hold an AGM. The respondent thus contended that since the appellant was appointed as MD on 31 March 2000 after he ceased to be a director on 31 December 1998, the service agreement was void and unenforceable.

Held, dismissing the appeal with costs of RM10,000:

(1) As the relief under s 20(1) of the Act was only made available to a 'workman', the first and foremost consideration would be to consider whether the claimant was a 'workman' as defined under s 2 of the Act. Thus, the learned chairman of the Industrial Court (the chairman) was correct in her approach to determine the status of the appellant as a 'workman' before determining whether the appellant had established a case for constructive dismissal (see paras 14–16).

(2) From the facts of the present case it was clear that the holding of office of director was only to last until the holding of the AGM after the 1997 AGM. The holding of the AGM after the 1997 AGM had been extended

to 31 December 1998. Therefore, this court agreed with the findings of the Industrial Court and the High Court that the appellant ceased to be a director of the respondent on 31 December 1998 and thus was not qualified to be appointed as MD under the AOA of the respondent. The appellant and all the other directors of the respondent during the period from 31 December 1998 to 15 June 2001, when the respondent convened its next AGM after the 1997 AGM, were not de jure directors of the respondent because they were not duly appointed in accordance with the AOA of the respondent company (see paras 34–35).

(3) By virtue of articles 92 and 93 of the AOA, which are clear and unambiguous that the MD could only be appointed from among the directors of the company and that the MD would immediately cease to be MD if he ceased to hold the office of a director, the appellant had no capacity to be appointed MD of the respondent company. Although the appellant could be a de facto director, his de facto directorship did not entitle him to be appointed MD of the respondent under the AOA. Thus, the appellant had no capacity to be appointed MD of the respondent and no valid legal capacity to enter into the service agreement. Consequently the service agreement was invalid, void and unenforceable and the appellant could not rely upon it to support his case (see paras 38–40 & 53).

(4) Further, the director who purportedly signed the service agreement on behalf of the respondent company was also a de facto director, who had no legal capacity to do so. Therefore, this was another ground to hold that the service agreement was invalid and unenforceable (see para 41).

(5) Contrary to what the appellant had said this court was satisfied that the Chairman had considered s 30(5) of the Act. The evidence and the background of the appellant's conduct in the present case clearly supported the Chairman's finding in not invoking s 30(5) of the Act in favour of the appellant. This court also agreed with Chairman and the High Court judge, in that, the appellant could not now resort to 'equity and good conscience' under s 30(5) of the Act to assist him, when he had flouted the provisions of the Companies Act 1965 and the AOA of the respondent company (see paras 51–52).

[Bahasa Malaysia summary

Pada 3 Jun 1998, perayu dilantik sebagai pengarah syarikat responden untuk memenuhi kekosongan selepas seorang daripada pengarah-pengarahnya meletakkan jawatan. Perlantikan tersebut adalah menurut artikel 109 daripada artikel persatuan responden ('APP'), yang memperuntukkan bahawa jawatan pengarah yang dipegang bertahan sehingga mesyuarat agung tahunan ('MAT') syarikat responden yang seterusnya. Menurut artikel 60(1) APP, responden perlu mengadakan MAT dalam jangka masa setahun atau dalam jangka masa

15 bulan selepas MAT terakhir pada 26 Jun 1997 ('MAT 1997'). Walau bagaimanapun, responden gagal untuk mematuhi artikel 60(1) APP. Sebaliknya dia memohon untuk dan dibenarkan dua lanjutan masa sehingga 31 Disember 1998 untuk mengadakan MAT. Walaupun lanjutan masa diberikan, tiada MAT diadakan pada 31 Disember 1998. Pada 16 Jun 2000, Pentadbir Khas ('PK') dilantik oleh Pengurusan Danaharta Nasional Bhd untuk menguruskan hal ehwal responden. Hanya pada 2001 selepas perlantikan PK barulah responden mengadakan MAT seterusnya selepas MAT 1997. Pada 31 Mac 2000, perayu memeterai satu perjanjian perkhidmatan dengan responden, yang ditandatangani oleh Chong Kee Ling, seorang pengarah responden pada ketika itu. Di bawah perjanjian perkhidmatan, perayu dilantik sebagai pengerusi eksekutif/pengarah urusan ('PU') bagi tempoh tiga tahun daripada 1 Februari 2000. Perayu mendakwa bahawa responden telah melanggar terma-terma dan syarat-syarat penting perjanjian perkhidmatan dengan tidak membayar tuntutan-tuntutannya dan gaji daripada Oktober 2000 hingga 18 Januari 2002. Oleh itu perayu mendakwa bahawa dia telah diberhentikan secara konstruktif tanpa sebab atau alasan yang adil. Respresentasi perayu telah dirujuk oleh Menteri kepada Mahkamah Perusahaan di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('Akta'). Responden mempertikaikan tuntutan perayu dan menghujah bahawa perayu bukannya seorang 'pekerja' memandangkan kontrak perkhidmatan tersebut adalah tidak sah dan tidak boleh dikuatkuasakan. Makamah Perusahaan mengetepikan permohonan perayu atas alasan bahawa perayu bukan merupakan 'pekerja' di bawah s 2 Akta. Perayu kemudiannya memohon kepada Mahkamah Tinggi untuk satu perintah certiorari di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan perintah Mahkamah Perusahaan tetapi Mahkamah Tinggi mengetepikan permohonan plaintif untuk semakan kehakiman. Ini merupakan rayuan perayu terhadap keputusan hakim Mahkamah Tinggi. Perayu menghujah bahawa perjanjian perkhidmatan tersebut merupakan satu kontrak pekerjaan yang sah antara dia dan responden dan bahawa responden telah melakukan satu pelanggaran penting kontrak tersebut. Responden menghujah bahawa perayu dilantik untuk memenuhi kekosongan pada 3 Jun 1998 menurut artikel 109 APP telah berhenti menjadi pengarah responden pada MAT seterusnya iaitu pada 31 Disember 1998 atau pada hari terakhir lanjutan masa untuk mengadakan MAT. Oleh itu responden menghujah bahawa memandangkan perayu dilantik sebagai PU pada 31 Mac 2000 selepas dia berhenti menjadi pengarah pada 31 Disember 1998, perjanjian perkhidmatan adalah tidak sah dan tidak boleh dikuatkuasakan.

Diputuskan, mengetepikan rayuan dengan kos RM10,000:

(1) Memandangkan relief di bawah s 20(1) Akta hanya dibuat terpakai untuk seorang 'pekerja', pertimbangan pertama dan utama adalah untuk menimbangkan sama ada penuntut merupakan seorang 'pekerja' seperti

yang didefinisikan di bawah s 2 Akta. Oleh itu, Pengerusi Mahkamah Perusahaan ('Pengerusi') yang bijaksana adalah betul dalam pendekatan beliau untuk menentukan status perayu sebagai 'pekerja' sebelum menentukan sama ada perayu telah membuktikan kes untuk pemecatan konstruktif (lihat perenggan 14-16).

(2) Daripada fakta-fakta kes ini, adalah jelas bahawa jawatan pengarah yang dipegang hanya bertahan sehingga MAT diadakan selepas MAT 1997. MAT diadakan selepas MAT 1997 telah dilanjutkan sehingga 31 Disember 1998. Oleh itu, mahkamah ini bersetuju dengan dapatan-dapatan Mahkamah Perusahaan dan Mahkamah Tinggi bahawa perayu berhenti menjadi pengarah responden pada 31 Disember 1998 dan oleh itu tidak layak untuk dilantik sebagai PU di bawah PPP responden. Perayu dan kesemua pengarah responden sepanjang tempoh daripada 31 Disember 1998 sehingga 15 Jun 2001, apabila responden mengadakan MAT seterusnya selepas MAT 1997, bukan merupakan pengarah-pengarah *de jure* responden sewajarnya kerana mereka tidak dilantik menurut APP syarikat responden (lihat perenggan 34–35).

(3) Menurut artikel 92 dan 93 APP, adalah jelas dan nyata bahawa PU hanya boleh dilantik daripada kalangan pengarah-pengarah syarikat dan bahawa PU akan segera berhenti menjadi PU sekiranya dia berhenti memegang jawatan pengarah, perayu tidak mempunyai kapasiti untuk dilantik sebagai PU syarikat responden. Walaupun perayu boleh menjadi pengarah *de facto*, dirinya sebagai pengarah *de facto* tidak membolehkan dia dilantik sebagai PU responden di bawah APP. Oleh itu, perayu tidak mempunyai kapasiti untuk dilantik sebagai PU responden dan tidak mempunyai kapasiti sah di sisi undang-undang untuk memeterai perjanjian perkhidmatan. Seterusnya perjanjian perkhidmatan adalah tidak sah, batal dan tidak boleh dikuatkuasakan dan perayu tidak boleh bergantung dengan perjanjian tersebut untuk menyokong kesnya (lihat perenggan 38–40 & 53).

(4) Selanjutnya, pengarah yang dikatakan menandatangani perjanjian perkhidmatan bagi pihak syarikat responden juga merupakan seorang pengarah *de facto*, yang tidak mempunyai kapasiti dari segi undang-undang untuk berbuat demikian. Oleh itu, ini merupakan alasan lain untuk memutuskan bahawa perjanjian perkhidmatan tersebut adalah tidak sah dan tidak boleh dikuatkuasakan (lihat perenggan 41).

(5) Bercanggahan dengan apa yang diperkatakan oeh perayu, mahkamah ini berpuas hati bahawa pengerusi telah menimbangkan s 30(5) Akta. Keterangan dan latar belakang tindakan perayu dalam kes ini jelas menyokong dapatan pengerusi dengan tidak menggunakan s 30(5) Akta berpihak kepada perayu. Mahkamah ini juga bersetuju dengan pengerusi dan hakim Mahkamah Tinggi bahawa perayu tidak boleh beralih kepada 'ekuiti dan hati nurani yang baik' di bawah s 30(5) Akta untuk

membantunya apabila dia telah melanggar peruntukan-peruntukan Akta Syarikat 1965 dan APP syarikat responden (lihat perenggan 51–52).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1037–1098.

Cases referred to

Assunta Hospital v Dr A Dutt [1980] 1 MLJ 96 (refd)
Club Flotilla (Pacific Palms) Ltd v Isherwood & Ors (1987) 12 ACLR 387 (refd)
Consolidated Nickel Mines, Ltd, re [1914] 1 Ch 883 (refd)
Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369, FC (refd)
Inchcape Malaysia Holdings Bhd v RB Gray & Anor [1985] 2 MLJ 297, SC (refd)
Kathiravelu Ganesan & Anor v Kojasa Holdings Sdn Bhd [1997] 2 MLJ 685, SC (refd)
Morris v Kanssen [1946] AC 459, HL (refd)
Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, CA (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92, SC (refd)
Zinotty Properties Ltd, Re [1984] 3 All ER 754, Ch D (refd)

Legislation referred to

Companies Act 1965 ss 143, 143(1), (2), 181
Industrial Relations Act 1967 ss 2, 20, 20(1), (3), 30(5)
Pengurusan Danaharta National Berhad Act 1998 s 41(1)(e)
Rules of the High Court 1980 O 53

Appeal from: Application for Judicial Review No R2–25–197 of 2004 (High Court, Kuala Lumpur)

Teh Hong Jet (Tan Kim Siong & Teh Hong Jet) for the appellant.
Sunther Thulasi (Affendi Zahari) for the respondent.

Ramly Ali JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant's claim at the Industrial Court is that he considered himself constructively dismissed by the respondent as at 18 January 2002 and that the respondent had breached the fundamental terms and conditions of his employment contract by not paying his claims and salaries from October 2000 until January 2002. The appellant applied for reinstatement under s 20 of the

Industrial Relations Act 1967 (the 'IRA') of his position with the respondent as executive chairman cum managing director.

[2] The respondent on the other hand disputed the appellant's claim and contended the appellant was never a 'workman' in the first place as the alleged service agreement between the appellant and the respondent was null and void and thus unenforceable.

[3] The Industrial Court had on 26 July 2004 dismissed the appellant's application on the ground that the appellant was not a 'workman' under s 2 of the IRA. The appellant then applied for an order of certiorari under O 53 of the Rules of the High Court 1980 ('the RHC') to quash the said Industrial Court order. The said application was also dismissed by the High Court on 12 June 2011. Dissatisfied with the decision of the learned High Court judge, the appellant filed an appeal to the Court of Appeal.

FACTUAL BACKGROUND

[4] The appellant was appointed as a director of the respondent on 3 June 1998 to fill a casual vacancy. Article 109 of the articles of association of the respondent provides that the appellant would hold office only until the date when the next annual general meeting (AGM) of the respondent would be held. After the 1997 AGM, it is not in dispute that no AGM was held within a year or even within 15 months from the 1997 AGM. The respondent applied for an extension of time to hold its AGM under s 143 of the Companies Act 1965. It was granted until 31 December 1998. It was also not in dispute that no AGM was held until that date (31 December 1998), not even until 2001 when special administrators had been appointed by Pengurusan Danaharta Nasional Bhd to administer the respondent company. The AGM was finally held after the appointment of the special administrator.

[5] The appellant was first appointed as a director of the respondent on 3 June 1998, to fill a casual vacancy. Under a service agreement entered into by the appellant and the respondent on 31 March 2000 (the service agreement) the appellant was appointed as executive chairman cum managing director for a period of three years from 1 February 2000. The said service agreement was signed on behalf of the respondent by one Chong Kee Ling, who was also a director of the respondent at that time.

[6] Under the service agreement, the appellant was entitled to a gross salary of RM20,000 per month, a housing allowance of RM5,000 per month, a driver and a company car together with all expenses in connection with the said car and driver. In addition he was entitled to be reimbursed for general expenses and dental and specialist consultation for himself and his immediate family up

to RM100,000 per year; one overseas leave passage and three domestic leave packages covering air fare, hotel accommodation, food and other related travelling expenses; the entrance fees and monthly expenses of the clubs in which the appellant was a member, and all travelling expenses, hotels, entertainment and out of pocket expenses incurred by him in the discharge of his duties.

[7] On 16 June 2000, the special administrators were appointed by Pengurusan Danaharta Nasional Bhd to manage the affairs of the respondent. The appellant continued to receive his salaries until September 2000 but not after that. Various letters were written by himself and by his solicitors to the special administrators on the matter. The appellant was later informed by the special administrators that the special administrators 'were looking into the matter and will revert to him soonest possible, and in the meantime the Special Administrators shall withhold all payments to him until the matter is resolved'.

[8] The appellant also claimed that he received a letter from the special administrators dated 18 January 2002 stating that they had been advised and were of the view that the appellant had ceased to hold office as a director of the respondent upon the expiry of the last day for holding the AGM for 1998 ie 31 December 1998 (as extended). The appellant found the letter 'very disrespectful and humiliating'. He then informed the special administrators that he considered himself constructively dismissed by the respondent as at 18 January 2002 because the respondent had breached the fundamental terms and conditions of his employment contract (as per the service agreement dated 31 March 2000) by not paying his claims and salary from October 2000 to 18 January 2002.

[9] The respondent on the other hand contended that the appellant, as a director appointed by the board on 3 June 1998 to fill a casual vacancy, could only hold office until the next following AGM of the respondent. The last AGM before the appointment of the special administrators was held on 26 June 1997. The next AGM of the respondent was convened and held on 15 June 2001. As such the appellant could only hold office until 31 December 1998 at the latest (the extended period to hold AGM). The respondent contended that since the appellant had ceased to be a director on 31 December 1998, he was therefore not a director and could not have been appointed executive chairman cum managing director when the service agreement was entered into on 31 March 2000. The appellant lacked the capacity to be appointed as a managing director of the respondent and the service agreement signed by him was null and void and thus unenforceable.

[10] The matter was referred to the Industrial Court on 20 November 2002 under s 20(3) of the IRA 1967. At the Industrial Court the learned chairman,

took the approach by addressing first a critical issue of whether the appellant was a 'workman' under s 2 of the IRA prior to determining whether the appellant has established that he was indeed constructively dismissed.

[11] The learned chairman agreed with the submission of the respondent that the appellant and the other directors of the respondent during the period from 31 December 1998 to 15 June 2001 (when the AGM was finally convened and held after the appointment of the special administrators) were not *de jure* directors. The Industrial Court found that since the appellant had ceased to be a director of the respondent on 31 December 1998, he was therefore not qualified to be appointed either as executive director or managing director nor could he be appointed as executive chairman cum managing director. The chairman also found that the appellant did not have the capacity to enter into the service agreement as he was not a director at the material time. Accordingly the appellant's claim at the Industrial Court was dismissed.

[12] The learned High Court judge found that the Industrial Court has not erred in law and in excess of jurisdiction warranting interference of the High Court. Her Ladyship affirmed the decision of the learned chairman of the Industrial Court and accordingly dismissed the appellant's application for judicial review. Hence, the present appeal before us.

DECISION OF THIS COURT

[13] The appellant made representations under s 20(1) of the IRA claiming that he had been constructively dismissed without just cause or excuse. The Minister referred those representations to the Industrial Court under s 20(3) of the same Act. Section 20(1) of the Act provides:

> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer he may make representation in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

[14] Clearly, the relief under s 20(1) is made available to a 'workman'. Non-workman is not eligible to be granted such a relief. Therefore the first and foremost consideration in invoking s 20 to be satisfied is that the claimant who makes the representation thereunder, must be a 'workman' as defined under s 2 of the same Act. The learned chairman of the Industrial Court was correct in her approach to determine the status of the appellant as a 'workman' first before proceeding to determine whether the appellant, as the claimant there, has established a case for constructive dismissal.

[15] The respondent had taken the stand that the Industrial Court has no jurisdiction to entertain the appellant's claim under s 20 of the Act on the ground that the appellant was not a 'workman' at the relevant time. This is an issue of jurisdiction of the Industrial Court. In other words the respondent was saying that the Industrial Court has no jurisdiction over the matter as the appellant was not a 'workman'.

[16] The above approach is not something strange in law. It is in line with the dicta of Gopal Sri Ram JCA (as he then was) in the case of *Kathiravelu Ganesan & Anor v Kojasa Holdings Sdn Bhd* [1997] 2 MLJ 685 cited by the learned chairman where the Supreme Court, inter alia, opined that 'where the challenge (to the threshold jurisdiction of the Industrial Court) is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg whether the particular workman is a workman …'.

[17] There are other reported cases where an employer raises the issue of jurisdiction of the Industrial Court to entertain a claimant's claim on the ground that the claimant is not a 'workman'. Examples of such cases are: *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96; *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297; and *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369.

[18] The decision of Mohd Azmi J in the case of *Assunta Hospital* on this issue can be a good guidance. In that case, the learned judge ruled:

> Once endowed with jurisdiction, it is for the Industrial Court to decide, inter alia, whether Dr Dutt is a 'workman' within the meaning of s 20(1). If he is a workman, the court must decide whether he has been dismissed without just cause or reason. If the court decides he has been dismissed without just cause or reason, the court will proceed to make an 'award', which under s 2 is not confined merely to reinstatement but is wide enough to cover the power to make other orders in respect of the matter referred to it.

[19] As clearly stated by Mohd Azmi J in that case, 'it is for the Industrial Court to decide whether Dr Dutt (the claimant) is a 'workman". If he is a 'workman' the court must decide, whether he has been dismissed without just cause or reason. Likewise, we should add that if he is *not* a 'workman' the matter ends there and the claim must be dismissed.

[20] The word 'workman' is defined under s 2 of the IRA. It means 'any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed,

discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute'.

[21] From the above definition, the essential element that must exist between the workman and the employer is a 'contract of employment' and that 'contract of employment' must be for the workman 'to work for hire or reward' with the employer. Being statutorily defined, a 'contract of employment' in s 2 refers not just to any contract but to a valid and legal contract where the parties to the contract are legally qualified and have the capacity to enter into the contract. This is in line with the basic requirement for a creation of a valid contract or agreement under the law.

[22] The existence of a 'contract of employment' is also essential in establishing constructive dismissal, which is the basis of the appellant's claim in the present case before us. In *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713, Lord Denning MR held that 'if the employer is guilty of conduct which is a significant breach going to the root of *the contract of employment*, or which shows that the employer no longer intends to be bound by one or more of the essential terms of *the contract*, then the employee is entitled to treat himself as discharged from any further performance; if he does so, then he terminates *the contract* by reason of the employer's conduct'.

[23] Salleh Abas LP in the Supreme Court case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 had also referred to a 'contract of employment' when His Lordship dealt with the question of 'dismissal':

> We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle. Thus it would be dismissal if an employer is guilty of a breach which goes to the root of *the contract* or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard *the contract* was terminated and himself as being dismissed.

[24] The appellant, as the claimant, has based his claim on the service agreement allegedly entered into between him and the respondent on 31 March 2000 under which he claimed to be appointed as executive chairman cum managing director of the respondent for a term of three years with effect from 1 February 2000. The appellant considered himself dismissed by the company (respondent) as at 18 January 2002 because the company (respondent) had breached the fundamental terms and conditions of his *employment contract* by not paying his claims and salaries from October 2000 until January 2002. As can be observed the appellant was making his claim based on the strength of the *employment contract* dated 31 March 2000 and alleged breach of the said employment contract by the respondent.

[25] It is a trite principle of contract law that in entering into a valid contract the parties thereto must have the necessary capacity to do so. A contract cannot be legally valid and therefore unenforceable if both or one of the parties are or is incompetent or have or has no capacity to enter into the said contract.

[26] Therefore, it is critical here to determine if there was a valid contract of employment or service between the appellant and the respondent. For that purpose the court should also determine whether the appellant was in law and in fact a director validly appointed in accordance with the articles of association of the respondent.

[27] In short, the appellant (as the claimant) before establishing whether or not he has been 'constructively dismissed' must prove:

(a) that at the time of the alleged dismissal he was a 'workman' as defined under s 2 of the IRA ie there has been a valid contract of employment between him and the respondent subsisting at that time;

(b) that the respondent by its conduct has breached a term or terms and conditions of the said contract of employment or has evinced an intention no longer to be bound by it;

(c) the breach must be a fundamental breach going to the root of the foundation of the said contract of employment;

(d) the appellant must have left the job in response to the said breach and not for some other unconnected reasons; and

(e) he must not delay too long in terminating the contract in response to the breach, otherwise he may be deemed to have waived the breach.

[28] The respondent's submissions in opposing the appellant's claim are as follows:

(a) the respondent did not have an AGM for a continuous period of four years, that is, between 26 June 1997–15 June 2001;

(b) the appellant was appointed as a director to fill a casual vacancy on 3 June 1998 and pursuant to article 109 of the articles of association of the respondent, the appellant ceased to be a director on the next AGM which was 31 December 1998 (the last day of the extended period);

(c) pursuant to article 93 of the articles of association of the respondent only a validly appointed director can be appointed as a managing director; and

(d) since the applicant was appointed as a managing director (executive chairman cum managing director) on 31 March 2000 after he ceased to be a director on 31 December 1998, the service agreement between the applicant and the respondent is therefore void and unenforceable.

[29] It is not in dispute that the appellant was appointed as a director of the respondent on 3 June 1998 to fill a casual vacancy after one of the directors resigned. The appointment was done under article 109 of the articles of association of the respondent which reads as follows:

> 109 The Directors shall have power at any time to appoint any person to be a Director either to fill a casual vacancy or as an addition to the existing Directors, but so that the total number of Directors shall not at any time exceed the maximum number fixed by or in accordance with these Articles. Any Director so appointed shall hold office only until the next following Annual General Meeting and shall then be eligible for re-election but shall not be taken into account in determining the retirement of Directors by rotation at such meeting.

[30] The holding of the AGM of a company is governed by s 143 of the Companies Act 1965 as well as article 60(1) of the articles of association of the respondent. For convenience, the provisions of s 143(1)–(2) are appended below:

> (1) A general meeting of every company to be called the 'annual general meeting' shall in addition to any other meetings to be held once in every calendar year and not more than fifteen months after the holdings of the last preceding annual general meeting but so long as a company holds its first annual meeting within eighteen months of its incorporation, it need not hold in the year of its incorporation or in the following year.
>
> (2) Notwithstanding subsection (1) the Registrar on the application of the company may if for any special reason he think fit so to do, extend the period of fifteen months or eighteen months referred to in that subsection, notwithstanding that such period is so extended beyond the calendar year.

[31] Article 60(1) of the respondent's articles of association provides:

> 60(1) The Company shall, in each year, hold a General Meeting as its Annual General Meeting, in addition to any other meetings in that year. Not more than fifteen months shall elapse between the date of one Annual General Meeting and that of the next.

[32] The effect of articles 60(1), 109 and s 143 of the Companies Act is clear and unambiguous ie the appellant would hold office of his directorship only until the next AGM of the respondent which was to be held in accordance with the articles of association within such period as extended by the registrar under s 143 of the Companies Act 1965. In *re Consolidated Nickel Mines, Ltd* [1914] 1 Ch 883, it was emphasised by Sargant J that:

> A director on his appointment does not ordinarily step into an office which is perpetual unless terminated by some act, but into an office the holding of which is limited by the terms of the articles.

[33] In that case, the court held that the holding of the office of director was only to last until the end of 1906, which was the last day on which a general meeting for that year could have been held. The above decision was adopted and followed in other cases such as *Club Flotilla (Pacific Palms) Ltd v Isherwood & Ors* (1987) 12 ACLR 387; *Morris v Kanssen* [1946] AC 459 (House of Lords); and *Re Zinotty Properties Ltd* [1984] 3 All ER 754 (Chancery Division).

[34] Notwithstanding article 60(1), there was no AGM held within a year or even within 15 months after the 1997 AGM. This is not in dispute. On applications by the respondent, extension of time was granted twice, first to 31 October 1998 and subsequently to 31 December 1998. It is also not in dispute that no AGM was held even until 31 December 1998. It was only in 2001 that the respondent convened its next AGM (after the 1997 AGM), after the special administrators were appointed.

[35] That being the case, we are of the same opinion with the learned chairman of the Industrial Court as well as the learned High Court judge that being a director appointed to fill a casual vacancy, the appellant therefore ceased to be a director on or after 31 December 1998. The appellant and all the other directors of the respondent during the period from 31 December 1998–15 June 2001 (when the next AGM was finally held after the appointment of the special administrators), were not *de jure* directors of the respondent. They were not duly appointed in accordance with the articles of association of the respondent company.

[36] Under the service agreement dated 31 March 2000, which was the basis of the appellant's contract of employment in his present claim, the appellant was appointed as *executive chairman cum managing director* for a period of three years from 1 February 2000. The question now is whether the appellant, who had by law, ceased to be a director of the respondent on 31 December 1998, was qualified to be appointed to the post of *executive chairman cum managing director* in accordance with the articles of association of the respondent company.

[37] Articles 92 and 93 of the respondent's articles of association are relevant to the above question. Both the articles are here reproduced in full for easy reference:

> 92(i) The Directors shall from time to time, appoint one (1) or more Directors to be Executive and/or Managing Directors for such period and upon such terms as they may think fit at any one time but if the appointment is for a fixed term, the term shall not exceed three (3) years; with power to appoint thereafter and may from time to time (subject to the provisions of any contract between the Executive and/or Managing Director and the Company) remove or dismiss him or them from office and appoint

another or others in his or their place or places. The Executive Director and/or Managing Director shall be subject to the control of the Board of Directors.

92(ii)An Executive and/or Managing Director shall, subject to the terms of any agreement entered into in any particular case, receive such remuneration (whether by way of salary, commission, or participation in profits, or partly in one way and partly in another) as the Directors may determine.

93. An Executive Director and/or Managing Director shall while he continues to hold that office be subject to retirement by rotation and he shall be taken into account in determining the rotation of retirement of Directors and be subject to the same provisions as to resignation and removal as the other Directors of the Company. The Executive Director and/or Managing Director, if he ceases to hold the office of director, shall ipso facto and immediately cease to be Executive Director and/or Managing Director, as the case may be.

[38] Again, articles 92 and 93 are clear and unambiguous ie the executive and/or managing director can only be appointed from among the directors of the company and the executive and/or managing director shall ipso facto and immediately cease to be executive and/or managing director if he ceases to hold the office of a director.

[39] The relevant articles of association of the respondent recognise only a director duly appointed under the articles. In this context the articles recognise de jure directors appointed either to fill in a casual vacancy under article 109 or appointed by the shareholders during general meeting. The articles do not recognise a de facto director who is not duly appointed in accordance with the articles. Being appointed to fill in a casual vacancy under article 109, the appellant shall hold office of the directorship only until the next following AGM, nothing more. His eligibility is only for 're-election' as a director at the next AGM. If he is not so 're-elected' at the AGM or if there is no AGM held within the stipulated period (and the period has lapsed), then he ceases to be a director. He may be a de facto director, 'occupying' the position of a director, but not a dejure director duly appointed under the articles of association of the company. He never 'holds' an office of a director for the company. His de facto directorship did not entitle him to be appointed a managing director of the respondent company under the articles of association. That being the case, by virtue of articles 92 and 93, he has no capacity to be appointed executive chairman cum managing director of the company; and consequently he has no valid legal capacity to enter into the service agreement dated 31 March 2000.

[40] Consequently, we are of the view that the said service agreement is invalid, void and unenforceable. Therefore, the said service agreement cannot be relied upon by the appellant in support of his claim in the present case.

[41] It is also noted that the person who purportedly signed the said service agreement dated 31 March 2000 on behalf of the respondent company ie Mr Chong Kee Ling — was also de facto director who was deemed to have vacated the office on the same material time. He ceased to be a director duly appointed pursuant to the articles of association of the respondent. At the time of signing the said agreement on behalf of the respondent, the said Mr Chong Kee Ling had no legal capacity to do so. Therefore, this is another ground to hold that the said service agreement is invalid and unenforceable.

[42] Another ground spelled by the appellant in the present appeal is that the learned chairman of the Industrial Court has failed to consider the decision of the Kuala Lumpur High Court under Petition No D7–26–24 of 2000 dated 28 November 2000 involving the same parties and the same subject matter and thus has breached the principle of stare decisis. The appellant contended that the Industrial Court did not address its mind to the fact that the said High Court petition against the appellant's directorship and his appointment as executive chairman cum managing director of the respondent had been dismissed by the Kuala Lumpur High Court.

[43] In that petition, one of the minority shareholders of the respondent (by the name: Cerah Kualiti Sdn Bhd — as the petitioner) filed for a petition for minority oppression pursuant to s 181 of the Companies Act 1965 against the respondent and various directors (including the appellant) seeking several reliefs, amongst others, a declaration that the appellant (third respondent in that petition) ceased to be a *de jure* or valid director of the respondent company; and a declaration that the appointment of the appellant as managing director of the respondent company on 1 February 2000 was invalid, unlawful null and void.

[44] In that petition, the appellant (third respondent therein) maintained that he was at all material times a valid director of the respondent company and the service agreement dated 31 March 2000 was valid and enforceable.

[45] At the material time when the said petition was filed in the High Court the respondent company was placed under the special administration pursuant to the Pengurusan Danaharta National Berhad Act 1998. Section 41(1)(e) of the said Act provides that on the appointment of the special administrator a moratorium shall take effect during which 'no proceedings and no execution or other legal process may be commenced or continued with and no distress may be levied against the affected person or its assets except with the prior written consent of the Corporation'.

[46] It is not in dispute that no consent was obtained from the Corporation (Pengurusan Danaharta) and also no application for consent has been made to

the said corporation. On that ground the learned High Court judge in that petition, Justice TS Nathan proceeded to dismiss the said petition on 28 November 2000 and ordered that the parties to bear their own costs.

[47] From the reading of the notes of proceedings in that petition, we are in agreement with the learned High Court judge (in the present case) that the said petition was actually dismissed by the court because written consent of the Corporation (Pengurusan Danaharta) as required under s 41(1)(e) of the Pengurusan Danaharta Act was not procured by the petitioner in that petition; and not because it was dismissed after hearing the merits. The learned chairman of the Industrial Court was correct in not accepting the contention by the appellant that the petition was heard on merits and that the learned chairman has erred on account of breaching the principle of stare decisis.

[48] On the above consideration, we are of the view that this ground of the appeal is without merit and must fail.

[49] The appellant also complained that the learned chairman of the Industrial Court went against the spirit of s 30(5) of the IRA and erred on ground of illegality when she failed to take into account of the said section.

[50] Under s 30(5), 'the court shall act according to equity, good conscience and the substantial merits of the case without regard technicalities and legal form'. The learned chairman in her grounds of judgment has indicated that:

> In coming to this decision the court has borne in mind the provisions of s 30(5) of the Industrial Relations Act 1967 to act according to equity, good conscience and the substantial merits of the case.

[51] Contrary to what the appellant has said we are satisfied that the learned chairman did consider s 30(5) of the IRA. The evidence and the background of the appellant's conduct in the present case clearly support the learned chairman's finding in not invoking s 30(5) in favour of the appellant. As submitted by the respondent (and accepted by the learned chairman and the learned High Court judge), the appellant as a director of the respondent (before he ceased to be one) had no regard for:

(a) s 143 of the Companies Act 1965 and article 60 of the articles of association to call for an AGM of the respondent on the due date, 31 December 1998;

(b) article 109 of the articles of association of the respondent in that the appellant continued as a director despite the expiry of his tenure; and

(c) article 92 of the articles of association of the respondent in that after he ceased to be a director pursuant to article 109, he had the audacity to

appoint himself as managing director of the respondent with another director, by the named Chong Kee Ling who signed on behalf of the company though he was only a *de facto* director but not a *de jure* director.

[52] Thus in this context, we agree with the learned chairman of the Industrial Court as well as the learned High Court judge that the appellant could not be said to come to the aid of the court with clean hands after having flouted the provisions of the Companies Act 1965 and the articles of association of the respondent company. The appellant clearly cannot now resort to 'equity and good conscience' under s 30(5) of the IRA to assist him.

CONCLUSION

[53] We find no element of illegality, impartiality or procedural impropriety by the learned chairman of the Industrial Court in dealing with the proceedings before her and ultimately in coming to her decision. She has taken into consideration all the relevant factors. She has not taken into consideration any irrelevant matters. We also find that the learned High Court judge had correctly affirmed the decision of the learned chairman of the Industrial Court. We agree with the findings of the learned chairman that the appellant had ceased to be a director of the respondent company on 31 December 1998, and therefore was not qualified to be appointed as executive chairman cum managing director under the articles of association of the company. The service agreement dated 31 March 2000 was invalid as the appellant had no capacity as a director to enter into such a contract at the relevant time.

[54] We find that the appeal before us is without merit and must fail. We therefore dismiss the appeal with costs of RM10,000 to the respondent. We also make an order that the deposit be paid to the respondent towards account of costs.

Appeal dismissed with costs of RM10,000.

Reported by Kohila Nesan